No. 84-762

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

AMOS E. REED, *et al.*,
Petitioners,

V.

CHARLES J. SLAKAN,
Respondent.

PETITIONERS' REPLY BRIEF

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioners Amos Reed, Ralph Edwards and Sam Garrison respectfully submit the following brief in reply to Respondent's brief opposing the Petition for Writ of Certiorari, pursuant to Supreme Court Rule 22.

ARGUMENT

THE DECISION OF THE FOURTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AS WELL AS THOSE OF THE OTHER CIRCUITS.

Respondent argues that the Fourth Circuit applied the correct legal standards relating to supervisory liability under 42 USC § 1983 and that those standards merely reflect the law as interpreted by other circuit courts of appeal. (Respondent's Brief in Opposition, pp. 15-16). However, a close reading of the cases cited by Respondent

reveals the contrary to be true. Those cases unequivocally hold that supervisory liability for the unconstitutional conduct of subordinates may not be predicated upon the mere failure of the supervisors to make rules governing their subordinates' conduct. Rather, there must be clear evidence of a nexus between the subordinates' misconduct and the adoption of a plan or policy by the supervisors showing their authorization of such misconduct. *Rizzo v. Goode,* 423 U.S. 362 (1976). For example, in *Hays v. Jefferson County,* 668 F.2d 869 (6th Cir.), *cert. denied,* 459 U.S. 833 (1982) the court said,

> The result of *Rizzo* and subsequent cases in the lower federal courts applying the standards it announced is that a failure of a supervisory official to supervise, control or train the offending individual officer is not actionable absent a showing that the official either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.

Id. at 874.

The cases cited by Respondent hold that a plaintiff can meet his burden in one of two ways. He can either show that the subordinates acted pursuant to a supervisory policy directive unconstitutional on its face, or that the supervisor, *with knowledge* of a past pattern and practice of unconstitutional conduct *failed to take any action* to remedy the situation thus leading to the inference that the supervisor authorized such misconduct.

An example of the first type of case is *Wagner v. Bonner*, 621 F.2d 675 (5th Cir. 1980), in which a police chief was held responsible for an unconstitutional search by deputies acting pursuant to the chief's policy that specified the manner of that search. Relying on *Rizzo* the Court expressly held that the chief could not be held liable for a failure to adopt policies to prevent constitutional violations. Rather, his liability

> [w]as based upon affirmative policies that he had acknowledged adopting concerning the manner in which arrest warrants were to be served and that the evidence showed had precipitated the alleged unconstitutional actions of his deputies.

Id. at 680-81.

Wagner presents the classic *Monell v. New York City Dept. of Soc. Services*, 436 U.S. 658 (1978) case of subordinates acting pursuant to an unconstitutional policy. However, Respondent in this case has never contended that Petitioners' use of force policies were unconstitutional.[1] Rather, Respondent's theory (adopted by the Fourth Circuit) has been that Petitioners failed to make *adequate* rules governing the use of force. Support for this theory must be found in the second line of cases cited by Respondent. *See, e.g., Languirand v. Hayden*, 717 F.2d 220 (5th Cir. 1983); *Lenard v. Argento*, 699 F.2d 874 (7th Cir.), *cert. denied*, _____ U.S. _____, 104 S. Ct. 69 (1983); *Turpin v.*

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[1]In fact such a position would be untenable since the policies expressly directed that only reasonable force be used (see A-27 to 38, Petitioner For Writ of Certiorari) and since there is no *per se* prohibition on the use of water hoses or mace against cell-confined inmates. *See, e.g., Bailey v. Turner*, 736 F.2d 963 (4th Cir. 1984).

Mailet, 619 F. 2d 196 (2nd. Cir. 1980), *cert. denied*, 449 U.S. 1016 (1982). As noted above, those cases hold that supervisory *inaction* may result in liability only upon proof of the supervisor's knowledge of a pattern and practice of constitutionally offensive conduct such that the failure to remedy that practice constitutes deliberate indifference to the injured party and led to the violation of those rights. The reasoning behind the holding is that such deliberate indifference amounts to implicit authorization of the illegal conduct thus satisfying the requirements of *Rizzo* and *Monell* that a nexus be shown between the misconduct and the adoption of a plan or policy authorizing such misconduct.

In *Estelle v. Gamble*, 429 U.S. 97 (1976) this Court stated that prison officials could be held liable for failing to provide adequate medical care to an inmate upon a showing that their deliberate indifference to the inmate's serious medical needs resulted in the wanton infliction of unnecessary pain. However, this Court has not gone as far as some circuits have in holding that deliberate indifference to a past history of unconstitutional conduct can result in liability for future injuries to others. In fact *Rizzo* seems to imply that supervisory inaction even in the face of a statistical pattern of misconduct cannot result in liability under 42 USC § 1983.[2] However, to the extent that this Court might adopt such a theory consistent with *Rizzo* and *Monell* it is

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[2]Respondent's attempts to distinguish *Rizzo* on the basis that it was decided in the context of a claim for injunctive relief are flatly contradicted by the very cases he cites. For example, *Hays v. Jefferson Country*, *supra*, specifically held that the reasoning of *Rizzo* applies in cases seeking monetary relief.

clear that liability must be grounded on proof that (1) the supervisory officials were or should have been aware of a past pattern and practice of misconduct, (2) that the officials failed to take any steps to remedy the misconduct such that their deliberate indifference amounted to authorization of the misconduct and (3) that plaintiff's injuries were the result of that indifference.

In this case the evidence failed, as a matter of law, to establish any of those elements of proof. First, even if it is assumed (as the Fourt Circuit did) that there was sufficient evidence to show Petitioners' awareness of the nine prior incidents of the use of water hoses and mace against cell-confined inmates offered by Respondent to show a pattern of misconduct[3], there was no evidence to show that Petitioners should have been aware that the force employed in those incidents was excessive. None had been litigated and, as noted above, the law was (as still is) that there is no *per se* prohibition on the use of water hoses and mace against cell-confined inmates. Further, injury was alleged in only two of the nine incidents and the injuries alleged were not of a serious or permanent nature. Second, Respondent himself introduced policies governing the use of force in general and water hoses in particular. (See A-27 through A-38 of the Petition for Writ of Certiorari.) The post hoc opinion that these policies were inadequate does not equate to "deliberate indifference." *Compare Estelle v. Gamble, supra.* Third, and perhaps most important, the nine prior cases dealt *only* with the use of water hoses and mace. Respondent's most serious injuries resulted from several blows to the head with riot batons. Thus, even if Petitioners' failure to adopt more specific guidelines on the use of water hoses and mace could be characterized as deliberate indifference, there was no

[3]Only Garrison was shown to have actual knowledge of these incidents. Edwards denied such knowledge. Plaintiff's expert testified only that Reed *should have known* of the incidents since he was Secretary of Correction.

affirmative link between that failure and the guards' misconduct or Respondent's injuries.

The Fourth Circuit's decision, although paying lip service to the deliberate indifference standard, failed to correctly apply the elements of proof essential to establishing the nexus between policy and misconduct required by *Rizzo*, *Monell* and cases in the other circuits. The result was to hold the Secretary of Correction, the Director of Prisons and the Warden of the State's largest prison answerable for punitive and compensatory damages without proof that they authorized or approved the misconduct of subordinates far below them in the chain of command.

As a final note, Respondent's argument that Petitioners failed to object to the jury instructions in this case misses the point that the evidence was insufficient as a matter of law to support a finding of supervisory liability under any appropriate legal theory. It also ignores the fact that the decision of the Fourth Circuit establishes legal precedent in conflict with the holdings of this Court in *Rizzo* and *Monell*, and of the other circuits.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

This 25th day of February, 1985.

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CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the Petitioners' Reply Brief has been served upon the following by depositing three (3) copies of the same in the United States Mail, postage prepaid, addressed to:

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This the 25th day of February, 1985.

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